No. 93-224

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

STATE OF TENNESSEE,

Petitioner,

vs.

WILLIE SPARKS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF TENNESSEE

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FOR THE RESPONDENT:

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QUESTION PRESENTED

1. Does the Tennessee Supreme Court's application of its own harmless error analysis in declining to reweigh aggravating circumstances against mitigating circumstances where one aggravating circumstance has been found to be invalid merit this Court's Certiorari review?

2. Does this Court have jurisdiction to consider the Tennessee Supreme Court's underlying reasoning in *State v. Middlebrooks* where that decision was based on an adequate and independent state law ground?

3. Did the Tennessee Supreme Court correctly find under the Eighth Amendment in *State v. Middlebrooks* that Tennessee's former death sentencing statute failed to genuinely narrow the class of persons eligible for the death penalty based on rational penological criterion?

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Opinion Below

The Opinion of the Tennessee Supreme Court below is unpublished. *Willie Sparks v. State of Tennessee*, Hamilton County no. 03S01-9212-CR-00105. It is reproduced in the Appendix to the Petition for Writ of Certiorari.

Jurisdiction

This Court lacks jurisdiction to hear this case pursuant to Article III of the United States Constitution and 28 U.S.C. 1257.

Constitutional and Statutory Provisions Involved

United States Constitution Article III

United States Constitution, Eighth Amendment

United States Constitution, Fourteenth Amendment

Tennessee Constitution, Article I, § 16

28 U.S.C. § 1257

Statement of the Case

Willie Sparks was convicted of felony first degree murder pursuant to Tenn. Code Ann. §39-2-202(a) and sentenced to death in Hamilton County, Tennessee. Sparks' sentence of death was premised, in part, on a statutory aggravating circumstances pursuant to Tenn. Code Ann. § 39-2-203(i)(7)(1982) that the murder was committed during the course of a felony.

Following the denial of his state post-conviction petition, the Tennessee Supreme Court granted permission to appeal to determine if the use of the felony murder aggravating circumstance to support the sentence of death was harmless error. The Tennessee Supreme

Court concluded that it was not harmless error, and remanded the case to the trial court for resentencing in light of it opinion in *State v. Middlebrooks*, 840 S.W. 2d 317 (1992).

The State of Tennessee filed a Petition for Writ of Certiorari with this Court.

Summary of the Argument

All five justices of the Tennessee Supreme Court concluded in light of its long held precedent that the *Middlebrooks* error in this case was not harmless beyond a reasonable doubt and declined to reweigh the remaining aggravating circumstances against the mitigating circumstances. This Court has previously determined in *Clemons v. Mississippi*, 494 U.S. 738 (1990) that the states are not required to reweigh but may with out violating the United States Constitution. Clearly where a state chooses not to reweigh, the Constitution is also not offended. The Tennessee Supreme Court did not reconsider the underlying rationale for its earlier *Middlebrooks* opinion in this case. This case would be a peculiarly inappropriate vehicle for reviewing that decision. In addition, the underlying rationale of the *Middlebrooks* opinion is premised upon the adequate and independent state ground of Article I, § 16 of the Tennessee Constitution. This Court is therefore without jurisdiction to review that ruling.

Should this court, however, conclude that it can reach the merits of the *Middlebrooks* rationale in this case, the ruling of the Tennessee Supreme Court that the felony murder aggravating circumstance fails to genuinely narrow the class of persons on a rational penological basis offends not only Article I, § 16 of the Tennessee Constitution but also the Eighth Amendment is correct. There is no principled basis upon which to condemn all felony murderers to death without proof of additional aggravating elements, while not so condemning

equally culpable premeditated, deliberate, malicious, and willful killers. A statutory aggravating circumstance that does not provide a basis upon which to rationally distinguish those few most deserving of death from those who do not receive death fails to satisfy the Eighth Amendment.

REASONS FOR DENYING THE WRIT

This Court should deny the State of Tennessee's Petition for a Writ of Certiorari because the judgment of the Tennessee Supreme Court in *Willie Sparks v. State of Tennessee*, (Hamilton County No. 03S01-9212-CR-00105), unpublished, May 10, 1993 is based upon the Tennessee Supreme Court's finding that the invalidation of one of two aggravating circumstances upon which a sentence of death was premised was not harmless error; the underlying opinion in *State v. Middlebrooks*, 840 S.W. 2d 317 (1992) upon which the invalidation was based rests upon an adequate and independent state ground of Article I, § 16 of the Tennessee Constitution; and the Tennessee Supreme Court in *Middlebrooks*, as an alternative holding, correctly found that the felony murder aggravating circumstance in question in *Middlebrooks* and here violated the Eighth Amendment as well as Article I, § 16 of the Tennessee Constitution.

I. The Tennessee Supreme Court's Application of Harmless Error Analysis is not a Certworthy Issue in Light of *Clemons v. Mississippi*

The judgment of the Tennessee Supreme Court *in this case* involves a question of the proper application of the harmless error rule where one of two statutory aggravating circumstances upon which a sentence of death is premised has been found to be invalid . The holding of the Tennessee Supreme Court is stated both at the beginning of its opinion and

near the end of the opinion in *Sparks v. State of Tennessee, supra*:

> We granted permission to appeal in this post-conviction action in order to determine whether the use of the felony murder aggravating circumstance, T.C.A. § 39-2-203(i)(7) (1982), to support the death penalty for felony-murder was harmless error in this case. We hold that it was not and remand the case for resentencing. (See App. to Cert. A-1)(emphasis supplied)
>
> * * *
>
> In conclusion, we cannot say that the *Middlebrooks* error in this case was harmless beyond a reasonable doubt. We therefore remand this matter to the trial court for a new sentencing hearing in accordance with *State v. Middlebrooks*, 840 S.W. 2d 317. . . (See App. to Cert. A-6) (emphasis supplied)

In addition, both Justice Drowota and Special Justice Lewis in their concurring and dissenting Opinions, state that given the fact that the *Middlebrooks* decision was the law of the State of Tennessee at the time of the decision, that they could not say that the *Middlebrooks* error was harmless beyond a reasonable doubt. (See App. to Cert. A-9, 10)

The question decided by the Tennessee Supreme Court was not. as Petitioner would have it:

> The decision of the Supreme Court of Tennessee in this case erroneously concluded that Tennessee's death penalty statute fails to narrow the class of death-eligible defendants adequately where a defendant is convicted of felony murder, and one of the aggravating circumstances found by the jury in the sentencing phase is the felony murder aggravating circumstance. (Cert. Pet. at 4)

The judgment of the Tennessee Supreme Court merely involves a question of the proper application of the harmless error rule where a statutory aggravating circumstance has been found to be invalid. The Tennessee Supreme Court found that its prior ruling in *Middlebrooks* invalidated the felony murder aggravating circumstance in Tenn. Code Ann. § 39-2-203(i)(7) (1982) upon which the death sentence in this case was, in part, premised. The Tennessee Supreme Court then relied on long held precedent in concluding that this was not

harmless error, citing *State v. Terry*, 813 S.W. 2d 420, 424-5 (Tenn. 1991) and *State v. Pritchett*, 621 S.W. 2d 127, 129 (Tenn. 1981). (See App. to Cert. A-3). All five justices concurred that they could not find the error to be harmless where one of two statutory aggravating circumstances was invalidated.

In a weighing state such as Tennessee, a state court's finding that error was not harmless beyond a reasonable doubt and its refusal to reweigh the remaining aggravating circumstance against the mitigating circumstances cannot offend the United States Constitution. "Nothing in this opinion is intended to convey the impression that state appellate courts are required to or necessarily should engage in reweighing or harmless error analysis when errors have occurred in a capital sentencing proceeding. . . . In some situations, a state appellate court may conclude that peculiarities in a case make appellate reweighing or harmless error analysis extremely speculative or impossible.. . . Nevertheless, that decision is for state appellate courts, . . ., to make" *Clemons v, Mississippi*, 494 U.S. 738, , 110 S. Ct. 1441, 1451. The Tennessee Supreme Court has clearly found reweighing in this situation to be inappropriate.

The judgment of the Tennessee Supreme Court did not reconsider the *Middlebrooks* decision in this case, despite the fact that this case was decided after this Court granted *Certiorari* in the *Middlebrooks* case.[1] It merely applied *Middlebrooks* to the situation in this case and concluded that the *Middlebrooks* error was not harmless beyond a reasonable doubt.

The Tennessee Supreme Court clearly applied its own prior ruling in *Middlebrooks*,

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[1] This Court granted *certiorari* in Tennessee v. Middlebrooks, Case No. 92-989, on April 19, 1993. The Tennessee Supreme Court released it opinion and judgment in Sparks v. State of Tennessee, Case No. 03S01-9212-CR-00105, Hamilton County, on May 10, 1993.

and then declined to reweigh the remaining aggravating circumstance against the mitigating circumstances because of its own prior cases of *Terry* and *Pritchett*. The application of harmless error analysis by the Tennessee Supreme Court in declining to reweigh aggravating circumstances against mitigating circumstances is not an issue worthy of this Court's review on *Certiorari*.

II. The *Middlebrooks* Decision Rests Upon Adequate and Independent State Grounds

Should this Court conclude that it could look beyond the plain statement of state law enunciated by the Tennessee Supreme Court *in this case* to examine whether the reasoning behind *State v. Middlebrooks*, *supra*, is based on adequate and independent state grounds, this Court would still lack jurisdiction, because the judgment of the Tennessee Supreme Court in *State v. Middlebrooks*, 840 S.W. 2d 317(1992), *cert. granted* ___ U.S. ___, 113 S. Ct. 1840 (April 19, 1992) rests upon the adequate and independent State ground of Article I, §16 of the Tennessee Constitution. The judgment of the Tennessee Supreme Court in this case therefore must also necessarily rest upon the same adequate and independent State ground of Article I, § 16 of the Tennessee Constitution. This Court lacks jurisdiction to review that judgment under Article III of the United States Constitution and 28 U.S.C. § 1257.

The Tennessee Supreme Court concluded in *Middlebrooks* that, because the Tennessee Legislature prohibited enhancement of non-capital sentences by the use of facts that are elements of the underlying offense, See Tenn. Code Ann. § 40-35-111 (1982) and § 40-35-114 (1990), Article I, §16 of the Tennessee Constitution prohibits such duplication for purposes of enhancement in capital sentencing. This result was reached entirely by interpreting the Tennessee Constitution in light of Tennessee statutes. It was independently

supported by a second line of analysis which referred to the reasoning of other non-federal authorities. The reasoning of opinions of this Court such as *Lowenfield v. Phelps*, 484 U.S. 231 (1988) were discussed and rejected as inapposite under the Tennessee Constitution.

The unambiguous and repeated language of the Tennessee Supreme Court made clear that its decision did not rest on federal law. The Court looked to the reasoning of other jurisdictions and commentary as a basis for judgment under the Tennessee Constitution, not the Eighth Amendment. The Tennessee Supreme Court reiterated that it was rendering its judgment under "the Tennessee Constitution" and that it was looking to federal constitutional cases, such as *Lowenfield* only for whatever persuasive force their reasoning may have had in applying Article I, § 16. Because the Tennessee Supreme Court did not feel compelled by federal law to interpret Article I, § 16 as it did, Article I, § 16 provided an adequate and independent state ground for the judgment. That the Tennessee Supreme Court also, as an alternative holding, found that the Tennessee statute violated federal Eighth Amendment principles, did not suffice to confer jurisdiction on this court in either the *Middlebrooks* case or consequently in this case. See, Respondent's Brief on the Merits, *Tennessee v. Middlebrooks*, Case No. 92-989, pp. 15-27.

III. *State v. Middlebrooks* Was Correctly Decided Under the Eighth and Fourteenth Amendments

If this Court should conclude that it does have jurisdiction to reach the *Middlebrooks* issue and that *Middlebrooks* itself does not preclude review because it is based on an independent and adequate state ground and reaches the Eighth Amendment issue, the holding of the Tennessee Supreme Court that Willie Sparks' sentence of death offends not only

Article I, § 16 of the Tennessee Constitution but also the Eighth Amendment must be affirmed. See, Respondent's Brief on the Merits, *Tennessee v. Middlebrooks*, Case No. 92-989, pp.27-50.

Without citation, Petitioner states: "The majority of the Supreme Court of Tennessee opined that the result is a violation of *Furman v. Georgia*, 408 U.S. 238 (1972), because the jury is given unfettered discretion to determine who would receive the death penalty and who would not." (Pet. for Cert. at 5). Nowhere in the *Middlebrooks* opinion does the Tennessee Supreme Court claim that the Tennessee statute violates *Furman*. Rather the Tennessee Supreme Court held at 346:

> We have determined that in light of the broad definition of felony murder and the duplicating language of the felony murder aggravating circumstance, no narrowing occurs under Tennessee's first-degree murder statute. We hold that, when the defendant is convicted of first-degree murder solely on the basis of felony murder, the aggravating circumstance set out in Tenn. Code Ann. §§ 39-2-203(i)(7) (1982) and 39-13-204(i)(7) (1991), does not narrow the class of death- eligible murderers sufficiently under the Eighth Amendment to the U.S. Constitution and Article I, § 16 of the Tennessee Constitution because it duplicates the elements of the offense. As a result, we conclude that Tenn. Code Ann. §39-2-203(i)(7) is unconstitutionally applied under the Eighth Amendment to the U. S. Constitution and Article I §16 of the Tennessee Constitution where the death penalty is imposed for felony murder.. . .

While the Tennessee Supreme Court did not hold that the Tennessee sentencing scheme specifically violated *Furman*, it did alternatively, find that it violated the Eighth Amendment.

Tennessee has defined First-Degree Murder as broadly as any state in the nation. The sweep of Tennessee's first-degree murder statute is now broader than it was at the time of *Furman*. The two classes that make up the entire class of first-degree murderers are premeditated, malicious, willful, and deliberate killers, and those that commit a killing during the course of a large number of enumerated felonies. If the state charges a defendant with

felony murder, the state is relieved of the burden of proving any intent to commit, the killing. The fact of the felony substitutes for proof of intent to commit the killing. See, e.g. *State v. Cauthern*, 778 S.W. 2d 39, 47 (Tenn. 1989) ("Malice is not an element of felony murder")

While the punishment for first-degree murder is defined as "death or imprisonment for life" Tenn. Code Ann. § 39-2-202(b)(1982), in order for a defendant to be sentenced to death, the jury must find at least one statutory aggravating circumstance. Tenn. Code Ann. § 39-2-203(i). (1982) Willie Sparks was convicted of first degree felony murder and two statutory aggravating circumstances, one of which was Tenn. Code Ann. 39-2-203(i)(7)(1982) that the murder was committed during the course of a violent felony, the same violent felony that had made him guilty of first-degree murder. Because the elements of the statutory aggravating circumstance are identical to the elements of first degree murder, the jury was compelled to find the existence of the statutory aggravating circumstance, once it had found Sparks guilty of first-degree murder. No additional elements were required to be proven by the state. Thus, as soon as Sparks was convicted of first-degree murder, he was essentially required to prove sufficient mitigating factors to demonstrate why he should not be executed. No defendant convicted of first-degree premeditated murder is put in the same position. In order to obtain a death sentence against a premeditated first-degree murderer, the state must prove an additional element not contained within the definition of premeditated first-degree murder.

The Tennessee Supreme Court could find no principled basis for this distinction under either Article I, § 16 of the Tennessee Constitution or the Eighth Amendment. By automatically subjecting all felony murderers to a capital sentence that cannot be imposed on

any premeditated murderer without proof of additional aggravation going beyond the base elements of first degree murder, Tennessee has failed to "genuinely narrow" the class of persons eligible for capital sentencing in the manner required by the Eighth Amendment to insure a rational and even-handed administration of the death penalty.

This Court has held in a long line of cases from *Gregg v. Georgia*, 428 U.S. 153 (1976), through *Zant v. Stephens*, 462 U.S. 862 (1983), and *Arave v. Creech*, 507 U.S. ___, 113 S. Ct. 1534, (1993) that statutory aggravating circumstances must provide a principled basis upon which to single out the worst offenders for the sentence of death:

> To pass constitutional muster, a capital sentencing scheme must *'genuinely narrow'* the class of persons eligible for the death penalty and must *reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.*

Lowenfield v. Phelps, 484 U.S. 231, at 244 (1988) (emphasis supplied), *quoting Zant v. Stephens, id.* The felony murder aggravating circumstance at issue here and in *Middlebrooks* does not provide a principled basis for sentencing all felony murderers to death without proof of any additional element, while requiring proof of an additional element to obtain a death sentence against every premeditated murderer. Not every felony murderer is necessarily worse than every premeditated murderer. The State of Tennessee has not provided a principled basis for singling out the very worst of all death-eligible first-degree murderers.

"Genuine narrowing" precludes the undifferentiated infliction of the death sentence upon the entire mass of felony murderers. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) By insisting that the States draw meaningful, rational distinctions between those persons who receive the death penalty and those who do not, the Eighth Amendment narrowing requirement stands at the heart of an "evenhanded, rational, and consistent

imposition of death sentence under law.' *Jurek v. Texas*, 428 U.S. 262, 276 (1976). Because Tennessee's statutory death sentencing scheme broadly defined the class of death-eligible first degree murderers (cf. *Lowenfield v. Phelps, supra*), because the felony murder aggravating circumstance provides no genuine narrowing nor any principled basis for distinguishing among felony murderers, and because the felony murder aggravating circumstance provides no rational penological ground for distinguishing the class of all felony murderers from the class of all premeditated first-degree murderers on the basis of the moral culpability of the offender, See, *Penry v. Lynaugh* 492 U.S. 302, 109 S. Ct. 2934, 2947 (1989), the opportunities for the arbitrary and capricious imposition of the death penalty are as rampant in Tennessee in 1984 as they were pre-*Furman*.

The Tennessee Supreme Court correctly held as a matter of Tennessee law, as a matter of Article I, § 16 jurisprudence and as a matter of Eighth Amendment jurisprudence that the felony-murder aggravating circumstance as applied in the case of Donald Middlebrooks (and through the *Middlebrooks* opinion to Willie Sparks) failed to provide a rational basis for treating all felony murderers more severely than all premeditated murderers for purposes of capital punishment.

Petitioner contends the Tennessee Supreme Court (in *Middlebrooks*) "grossly misinterpreted this court's opinions in *Tison v. Arizona*, 481 U.S. 137 (1987) and *Enmund v. Florida*, 458 U.S. 782 (1982)," stating that *Tison* did not involve or even mention "narrowing." But nothing in *Enmund* or *Tison* overrules or obviates the "narrowing

requirement" that has been reiterated in this Court's cases from *Zant* to *Arave*.[2] The *Enmund* and *Tison* decisions establish a minimum level of culpability beneath which the death penalty may never constitutionally be imposed on accomplices to murder. The State of Tennessee cannot be "'genuinely narrow[ing] the class of defendants eligible for the death penalty,'" *Arave*, 113 S.Ct. at 1542, *quoting Zant*, 462 U. S. at 877, by requiring proof of this constitutionally mandated minimum *mens rea* for the imposition of the death penalty.

The function of the *Enmund/Tison* requirement and of the "narrowing" requirement are distinct, and both must be independently satisfied. *Enmund* and *Tison* exclude some murderers altogether from the potential reach of the death penalty. The "narrowing" requirement is focused on those that remain, in order to assure that the persons actually sentenced to die are selected from among them in an even-handed, nonarbitrary and rational manner.[3]

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[2] *Zant v. Stephens* 462 U. S. at 878 ("they circumscribe the class of persons eligible for the death penalty."); *Barclay v. Florida* 463 U.S. at 960, Stevens, J. concurring ("genuinely narrow[ing] the class of persons eligible for the death penalty); *Blystone v. Pennsylvania* 494 U. S. 299, 306-7 (1990) (The presence of aggravating circumstances serves the purpose of limiting the class of death eligible defendants..."); *Lowenfield v. Phelps* 484 U.S. at 244: ("The use of 'aggravating circumstances' is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion.")

[3] Petitioner's arguments also ignore this Court's Eighth Amendment jurisprudence on the role of aggravating circumstances. In *Maynard v. Cartwright*, 486 U.S. 356 (1988), this Court affirmed the ruling of the Court of Appeals invalidating the sentence of death based on a vague aggravating circumstance. There was no question that Cartwright met the *Tison/Enmund* standard since he was the actual killer. *See, also Walton v. Arizona*, 497 U.S. 639; *Sochor v. Florida*,504 U.S. ___, 112 S. Ct. 2114 (1992); *Arave v. Creech*, 507 U.S. ___, 113 S.Ct.1534 (1993); *Stringer v. Black*, 503 U.S. ___, 112 S. Ct. 1130 (1992); *Lewis v. Jeffers*, 497 U.S. 764 (1990), all of which involved murderers who clearly met the *Tison/Enmund* standard and where this Court considered the effect of aggravating circumstances in identifying those who were actually sentenced to die.

Petitioner further argues that whether or not the felony murder aggravating circumstance itself actually performs any narrowing function is irrelevant for Eighth Amendment purposes because the system as a whole provides adequate procedural protections to insure against the arbitrary and capricious imposition of the death penalty. These arguments ignore the repeated holdings of this Court that in "weighing" states such as Tennessee, every aggravating circumstance upon which the jury was authorized to rely exclusively in imposing a death sentence upon a particular defendant must meet the "fundamental constitutional requirement" of "channeling and limiting the sentencer's discretion" so as to minimize "the risk of wholly arbitrary and capricious action." *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988); *Stringer* v. *Black*,503 U.S. ___, 112 S. Ct. 1130, 1139-1140; *Sochor v. Florida*, 504 U.S. ___, 112 S. Ct. 2114 (1992); *Espinosa v. Florida*, 505 U.S. _____, 112 S. Ct. 2926, 2928 (1992); *Zant v. Stephens*, 462 U.S. at 876 ("This conclusion rested, of course, on the fundamental requirement that <u>each</u> statutory aggravating circumstance must satisfy a constitutional standard derived form the principles of *Furman* itself.")(emphasis supplied). In *Arave v. Creech, supra*, this Court addressed the constitutional narrowing function of the "utter disregard for human life" aggravating circumstance, despite the presence of four other statutory aggravating circumstances that were not constitutionally challenged.

The conclusion of the Tennessee Supreme Court that the invalidity of one aggravating circumstance submitted to Willie Sparks' jury as a sufficient basis for a death sentence so infects his sentencing process as to require a resentencing is decisive. The Tennessee Supreme Court has decided that it does not "reweigh" or conduct harmless error analysis in this situation. It is irrelevant what other procedural protections may exist if the Tennessee

Supreme Court finds that they have not sufficiently regulated the sentencing process in the particular case at bar.

IV. Conclusion

The Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, certify that I have placed a true and correct copy of this Supplemental Brief in the United States Mail addressed to the Charles W. Burson, Attorney General and Reporter of Tennessee and Merrilyn Feirman, Assistant Attorney General, at their office at 450 James Robertson Parkway, Nashville, Tennessee, 37243-0485 with sufficient postage thereon to carry the same to its destination, this the 2nd day of ~~August~~ Sept. 1993

William R. Heck